# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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## No. 358

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PORTER-WADLEY LUMBER COMPANY, ET AL.,
*Petitioners,*

*vs.*

C. ORBIN BAILEY.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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I.

The opinion of the Court of Appeal, Fifth Circuit, is reported in the Federal Reporter, entitled, *Porter-Wadley Lumber Company, et al.*, v. *C. Orbin Bailey,* 110 Federal Reporter (2nd series) 974 (R. 264).

II.

**Jurisdiction.**

(1) The date of the decree to be reviewed is April 1st, 1940 (R. 267), the application for rehearing was denied June 13, 1940 (R. 274).

(2) a. It is contended that the opinion and decree violates Section 1 of Article 4 of the Constitution of the United States in denying full faith and credit to the dissolution proceedings of the Porter-Wadley Lumber Company, made

in accordance with the laws of Arkansas, the state creating the corporation;

b. Said opinion and decree annul valid contractual rights of petitioners in violation of Section 10, Article 1, of the Constitution of the United States;

c. That the opinion and decree are erroneous in failing to hold that the plea of ten years prescription filed by respondent did not apply to the rights of petitioners, but if applicable, same was interrupted by a written contract signed by respondent with petitioners, and by acceptance of rentals and royalties from petitioners, and by the minority of Margaret Porter, one of the petitioners, in accordance with the jurisprudence of Louisiana.

d. The opinion and decree are inconsistent in holding that the mineral rights were vested in the Porter-Wadley Lumber Company in a suit by respondent against petitioners, the sole stockholders of said corporation, without making the corporation a party to the proceeding.

(3) The statute believed to sustain the jurisdiction in this case is Section 24 of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938; January 31, 1928, 45 Stat. 54; June 7th, 1934, 48 Stat. 926.

(4) Cases believed to sustain appellate jurisdiction of the Supreme Court are: *Forsyth* v. *Hammond,* 166 U. S. 506, 41 L. Ed. 1095; *Title Guaranty & Surety Company* v. *U. S.,* 32 Sup. Ct. 168, 222 U. S. 401, 56 L. Ed. 248; *National Surety Company* v. *Cobb,* 66 F. (2d) 323; *Pease* v. *Peck,* 18 Howard 595, 15 L. Ed. 518; *Relf* v. *Rundle,* 103 U. S. 22, 26 L. Ed. 337; *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 514, 4 L. Ed. 629.

## III.

### Statement of the Case.

February 12th, 1916, the Porter-Wadley Lumber Company, an Arkansas corporation, sold the land in contro-

versy, including numerous other tracts of land, to the German-American Investment Company, reserving for thirty-five years certain mineral rights and privileges in consideration of the payment of one-half of the net amount derived from the sale of the development of said minerals to respondent and his authors in title (R. 85). May 3rd, 1917, the Porter-Wadley Lumber Company was dissolved in accordance with the laws of Arkansas (R. 126-127). May 28th, 1917, the German-American Investment Company changed its name to the North American Investment & Development Company, and on February 8th, 1918, transferred said property to G. R. Wise (R. 81), which contains the reservation subject to the following conditions:

> "This reservation being the reservation made in the deed to the grantor in their deed from the Porter-Wadley Lumber Company, and the grantor, the North American Investment and Development Company, hereby transfers and assigns to the grantee herein, his successors or assigns, all its right in and to one-half of all the net revenue that may be obtained from the sale of the oil, gas, sulphur, and minerals herein reserved."

September 3rd, 1919, G. R. Wise sold the property to H. L. Munn, subject to the following reservation:

> "It is understood and agreed that I am only transferring such mineral rights as acquired by me in deed from the North American Investment and Development Company as per records of Webster Parish, Louisiana" (R. 79).

March 25th, 1924, H. L. Munn sold the same property to C. Orbin Bailey, respondent. The trial judge, in his opinion (R. 206), said:

> "It is also stipulated that plaintiff acquired from H. L. Munn, and that H. L. Munn acquired from G. R. Wise, and that G. R. Wise acquired from the North

American Investment and Development Company; that the reservation made by the Porter-Wadley Lumber Company was referred to in all of said transfers."

February 23rd, 1926, petitioners executed an oil and gas lease to W. R. Ramsey for three years, which lease was concurred in March 13th, 1926, by C. Orbin Bailey, as follows:

"Now comes C. O. Bailey, husband of Eva Leonard, resident of the above Parish and State, who declared that, for the considerations set forth in the above and foregoing oil and gas lease, he does hereby ratify, affirm and approve the execution thereof by said Lessors to W. R. Ramsey, insofar as the same covers and affects the rights acquired and the minerals in and to an undivided — ¼th interest in the net revenues derived from the sale or lease of the mineral rights in and to the NE ¼ of the SW ¼ of Section 29, Township 23 North, Range 9 West, Webster Parish, Louisiana, in accordance with reservation made by the Porter-Wadley Lumber Company, in its deed with the German-American Investment and Development Company of date February 12, 1916, and acquired by me by mesne conveyances from said German-American Investment and Development Company.

"Thus Done, Read, and Signed in the presence of S. E. Munn and R. M. Franks, competent attesting witnesses on this, the 13th day of March, 1926.

C. O. Bailey."

In accordance with the terms of this lease, a well was drilled December 29, 1926, to the approximate depth of 4750 feet.

January 5th, 1928, appellants executed an oil and gas lease to C. H. Lyons, et al. (R. 102). In accordance with the terms of this lease, the drilling of a well was commenced April 9th, 1928, which produced gas in paying quantities until May 19, 1930, from which production C. O. Bailey received one-half of the net proceeds. June 9th, 1930, appel-

lants executed an oil and gas lease to the Pure Oil Company for a period of three years expiring June 9th, 1933, and C. O. Bailey received under this lease one-half of the net bonuses, rentals and royalties. November 29th, 1933, appellants executed an oil and gas lease to the Louisiana Oil Refining Company (R. 108) for a primary term of five years terminating November 29th, 1938.

The record shows that C. O. Bailey received from appellants one-half of the net proceeds derived from the bonuses, rentals and royalties from said property, as follows: $500.00 on July 10, 1930; $240.00 on November 30, 1935; $32.00 on December 9, 1935; $100.00 on November 5, 1936; $20.00 on November 5, 1937, and $200.00 on April 28, 1938.

Respondent ratified, approved and concurred in a mineral lease by petitioners covering said mineral rights December 29th, 1926, for one-half of the consideration therein set forth; Margaret Porter, one of petitioners, was a minor, which suspended the current of prescription under the law and jurisprudence of Louisiana; that said mineral reservation was in fact and in law a leasehold estate against which prescription does not run, and petitioners have not sold and respondent has not acquired said rights.

## IV.

### Specification of Errors.

(1) The Court of Appeals erred in holding that the Porter-Wadley Lumber Company, an Arkansas corporation, which was dissolved in accordance with the laws of the State of Arkansas, continued as a corporation in Louisiana by virtue of the provisions of Act 267 of 1914 of the Acts of Louisiana,[1] contrary to the provisions of

[1] See appendix for copy of Act.

Section 1, Article 4, of the Constitution of the United States, and contrary to the established jurisprudence of Louisiana and prior decisions of the Court of Appeals.

(2) That the Court of Appeals erred in holding that the respondent was the owner of the mineral rights thereby divesting petitioners of their rights under said reservation and impairing the contractual rights vested in petitioners in violation of Article 1, Section 10, of the Constitution of the United States.

(3) The Court of Appeals was in error in holding that a written ratification, approval, and concurrence by respondent with petitioners in a written mineral lease, under which respondent received benefits and rentals from petitioners, did not constitute an estoppel or an interruption or renunciation of prescription in accordance with the decision of the Supreme Court of Louisiana in *White* vs. *Ouachita Natural Gas Company,* 177 La. 1052, and subsequent approving decisions.

(4) That the opinion of the Court of Appeals held that the Porter-Wadley Lumber Company, though dissolved in accordance with the laws of Arkansas, the state of its creation, was an existing corporation in Louisiana and was the owner of said mineral rights, which opinion was inconsistent with its decree which cancelled said mineral rights in a suit against petitioners, sole stockholders of the corporation, when the corporation was not cited or made a party to the suit.

## V.

## ARGUMENT.

### First Assignment.

Under the laws of Louisiana a stipulation in a deed by which a grantor reserves oil, gas and other minerals from

the sale of the land made by him vests in him a servitude upon the land under which he has the right to go upon it and extract such oil, gas and minerals and thereupon become the owner of them. Such a servitude is extinguished by the non-usage of the same during ten years (*Revised Civil Code*, Art. 789). This is the prescription of ten years *liberandi causa*. Prescription, however, does not run against minors except in the cases specified by law (*Revised Civil Code*, 3554) and it is clearly established by the jurisprudence of Louisiana that such a servitude is not prescribed in ten years where one of the co-proprietors is a minor as the minority of one co-proprietor preserves the rights of all (*Revised Civil Code*, Art. 802; *Sample* v. *Whittaker*, 172 La. 722, 135 So. Rep. 38; *Sanders* v. *Ohio Oil Co.*, 155 La. 740, 99 So. Rep. 583).

As heretofore pointed out, one of the stockholders of Porter-Wadley Lumber Company was, upon dissolution, a minor. If, therefore, the reservation in question is to be considered as a servitude and not a lease, as was done by the court below, yet the servitude is not prescribed if upon dissolution of the corporation, its assets vested in the stockholders.

As appears from the opinion of the Court of Appeals, petitioners contended that upon the dissolution of the corporation according to the laws of Arkansas, its property passed directly to the stockholders and since one of them, Margaret Porter, was a minor and did not attain her majority until 1932, the prescription of ten years was suspended, not only as to her but as to her co-owners as well.

Petitioners contended in the trial court (R. 219) and in the Circuit Court of Appeals (R. 269, *et seq.*) that the ownership of the assets of the dissolved corporation was controlled by the laws of Arkansas, the domicile of the corporation, and that a refusal of the courts to determine this

ownership or the existence of the corporation by the laws of Arkansas violated the full faith and credit clause of the Constitution of the United States (Art. 4, Section 1).

The Court of Appeals has held that since the Supreme Court of the State of Louisiana has decided contrary to petitioners' contentions (*Munn* v. *Wadley*, 192 La. 874) in another case with a similar reservation it was bound to follow that determination (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64). This, it is submitted, is manifest error. What the law of Arkansas is, clearly presents no local question to be determined by the Louisiana courts nor is the application *vel non* of the full faith and credit clause of the Constitution of the United States a question of local law to be determined by the Louisiana Supreme Court. Ordinarily, we believe it may be said, that the law of Louisiana alone will be examined to determine the ownership of an immovable situated in Louisiana but if that owner is a legal person or a corporation, its identity must be determined by the laws of the sovereign power creating it.

When the State of Arkansas granted a charter to the incorporators of Porter-Wadley Lumber Company, there resulted a contract by which the laws of Arkansas guaranteed to those incorporators that upon the dissolution of the corporation without creditors, its assets vested in the stockholders. Even the Legislature of Arkansas could not subsequently deprive the stockholders of the corporation of their vested rights (*Dartmouth College* case, 4 Wheat. 514, 4 Law Ed. 629).

Under the laws of Arkansas in effect at the time this corporation was dissolved the corporation became totally extinct (Acts of Arkansas 1893, page 265, Section 4). The procedure for dissolution followed in this case is expressly authorized by Section 1823, Crawford and Moses Digest. When such procedure is invoked and accomplished where no

creditors are involved, the property of the dissolved corporation reverts to the stockholders. (*Jameson* v. *Henderson*, 189 Ark. 204, 71 S. W. (2d) 969.)

If upon dissolution of the corporation it became totally extinct and its assets became vested in its stockholders as petitioners contend, the mineral right in controversy is now owned by the petitioners because under the law of Louisiana the minority of one of the stockholders has prevented the running of prescription. If, therefore, prescription has run in this case as the Court of Appeals has held, it is because the assets of this corporation did not upon dissolution vest in the stockholders but remained in the corporation.

A corporation is an artificial being which exists only by virtue and in contemplation of law, and by law we mean the law of the particular sovereign power which created the corporation. It is well settled in all jurisdictions that a corporation which has been dissolved is as if it did not exist and the result of the dissolution cannot be distinguished from the death of a natural person in its effect (*Okla. Natural Gas Co.* v. *State of Okla.*, 273 U. S. 257, 71 Law. Ed. 635, 14A *C. J.* 1150, American Jurisprudence, Vol. 13, page 1191). A non-existent person, whether natural or artificial, can have none of the attributes of a person in being. Neither a dead corporation nor a dead natural person can enjoy the right of ownership. It would seem to be fundamental and the principle is expressly recognized by Louisiana law (Revised Civil Code 493) that the right of ownership necessarily supposes the existence of a person in whom this right exists whether the owner be a real person as an individual or a civil person as a corporation.

The decision of the Supreme Court of Louisiana in the case of *Munn* v. *Wadley, supra,* which the Circuit Court of Appeals holds is controlling here says that the real right in controversy was never vested in the stockholders of the

dissolved corporation because Section 30 of Act 267 of 1914 of the Louisiana Legislature is applicable to foreign as well as to domestic corporations and provides that dissolved corporation shall remain in existence for certain purposes. Therefore, the decision of the Court of Appeals which follows the decision of the Supreme Court of Louisiana squarely presents the question whether the laws of Louisiana may prolong the corporate existence of an Arkansas corporation which the decisions hold, in spite of the Arkansas statute which ends its corporate existence and Article IV, Section 1, of the Constitution of the United States.

Petitioners contend that neither the Legislature nor the courts of Louisiana may prolong the existence of a foreign corporation and that the decision of the Supreme Court of Louisiana in *Munn* v. *Wadley, supra,* is not only fundamentally unsound but is contrary to other holdings of the same court and that the decision of the Court of Appeals to the same effect is likewise inconsistent with former decisions of this same court.

The Supreme Court of Louisiana in *Wilkinson* v. *Wogan,* 162 La. 133, 110 So. 176, expressly held that the dissolution of a corporation is "controlled by its charter and the laws of the sovereignty by which it was created". The court further stated:

> "The courts of one state or country have no jurisdiction or power to dissolve a corporation created by another state or country. The fact that the foreign corporation does business or owns property in the state where the action to dissolve is brought does not give the court the power to dissolve it."

The correctness of the principle stated by this decision is universally recognized and requires no citation of authority. Likewise, it is clear that the dissolution of a corporation in accordance with the laws of its domicile has the effect of

dissolving it wherever it is doing business, notwithstanding the statutes of the State in which it is doing business provide for a continuance of corporate existence after dissolution. (14A *Corpus Juris*, page 1150, 1349.) Aside from the case of *Munn* v. *Wadley*, there is no decision of the Louisiana Supreme Court in the least inconsistent with the principles just stated.

It is submitted further that the decision of the Circuit Court of Appeals in this case is inconsistent with the decision of the same court in the case of *National Surety Company of New York* v. *Cobb*, 66 F. (2d) 323. In that case the court was considering whether or not a judgment rendered by the courts of Louisiana against a foreign corporation authorized to do business in Louisiana but which had been prior to the filing of the suit dissolved in accordance with the laws of New York, the State of its creation, was valid. The court after considering that the laws of New York as distinguished from the laws of Louisiana made no provision for continued corporate existence after dissolution concluded that these laws were controlling and in holding the judgment void said:

> "We think it equally clear that dissolution under the insurance laws brings about the civil death of the corporation and that suits thereafter brought and judgments thereafter obtained upon service on statutory agents designated in other states are nullities."

Although the statutes of Louisiana under which this dissolved corporation qualified to do business in Louisiana constituted the Secretary of State of Louisiana the agent for service of process upon such corporation as long as any outstanding obligation of the corporation continued, yet the court recognized as a fundamental proposition that a dissolved corporation is *civiliter mortuus*, and that if by the laws of the State of its creation it became totally extinguished, it was equally extinguished in every other State

where it might have been doing business, and the same act of Louisiana which by the decision complained of continues the corporate existence of the Arkansas corporation did not continue the corporate existence of the New York corporation.

The Supreme Court of Louisiana was influenced in its decision by the argument that real estate devolves from a decedent by virtue of the law of the State where the property is situated and that the law of the domicile of the owner is not controlling. With this principle there is, of course, no complaint. Petitioners contend that where a corporation is dissolved its property does not "devolve" within the meaning of the principle just stated and even if it does, yet under Louisiana law it devolved upon the same persons that it did under Arkansas law. The complaint we make is not that under Louisiana law it devolved upon different persons from those provided by Arkansas law, but that the decision the Supreme Court of Louisiana held that it never devolved at all but remained in a non-existent corporation.

It is frequently stated that there are only two modes known to the law by which title to property can be acquired; namely, descent and purchase. An estate "descends" or devolves merely by operation of law when the owner dies intestate. If, however, he dies testate, the property does not devolve or descend by operation of law but the estate passes from the former owner to the new owner by purchase (16 *American Jurisprudence* 769; *Barnetzs, Lessee,* v. *Casey,* 7 Cr. 456, 3 Law Ed. 403; *Gardiner* v. *Collins,* 2 Peters 58, 7 Law Ed. 347; 18 *Corpus Juris, Verbo Devolve,* 1034; 12 *Words & Phrases, Verbo Devolve,* 372.

Under this principle where the rights to the property become fixed in the stockholders by virtue of the charter contract, the property of the corporation upon dissolution no more devolves than does the property of a natural per-

son who dies testate. In either case the property is transferred by purchase and not by descent.

The share of the stockholder is "the individual interest of the stockholder constituting his right to a proportional part of the dividends when declared and to a proportional part of the effects of the corporation when dissolved after payment of its debts (*Minot* v. *Philadelphia, Wilmington & Baltimore R. Co.,* 85 U. S. 206, 230, 21 Law Ed. 896) and when the charter is terminated and the legal life of the corporation ended no property rights are changed in the least but the result is merely that this death of the corporation leaves all the property to the shareholders after the payment of the corporation's debts, and each shareholder takes his proportionate share in accordance with the law of the domicile of the corporation. (*Rhode Island Hospital* v. *Doughton,* 270 U. S. 69, 81; 70 Law Ed. 475; *Lakeshore & Michigan S. R. Co.* v. *Smith,* 173 U. S. 684, 698; 43 Law Ed. 858; *First National Bank* v. *Main,* 284 U. S. 312, 76 Law Ed. 313.)

The dissolution of a corporation merely destroys the stock as such and under the modern equitable view substitutes the thing which the stock represented; that is, an interest in the property. (13 *American Jurisprudence* 1198; *Pewabic Mining Company* v. *Moore,* 145 U. S. 349, 36 Law Ed. 732; *Church* v. *United States,* 136 U. S. 1, 34 Law Ed. 478.)

The rule that upon the death of a corporation the stockholders become the owners of its assets subject to the payment of the debts of the corporation is what is known in the common law jurisprudence as the trust fund doctrine and this doctrine has always been the law in Louisiana. (13 *American Jurisprudence* 1198; 47 A. L. R. 1361; *Citizens Bank & Levee Steam Cotton Press Company,* 7 La.

Ann. 286; *Stark* v. *Burke,* 5 La. Ann. 741; *Burke* v. *Wall,* 29 La. Ann. 38; *Hincks* v. *Converse,* 37 La. Ann. 484.)

The opinion of the Supreme Court of Louisiana does not hold that the title passed from the corporation to any other person than the stockholders. It merely holds that the title remained in the corporation after its dissolution and that it would so remain until transferred from the corporation by liquidators or a judgment of the court. Petitioners complain, therefore, not because under the decision the property was held to devolve under the law of Louisiana instead of the law of Arkansas, but because under the decision the property has not devolved at all but has remained in a nonexistent legal person. Neither the opinion of the Louisiana Supreme Court nor that of the Circuit Court of Appeals ventures to state how Porter-Wadley Lumber Company could be an extinct corporation in Arkansas and an existing corporation in Louisiana.

Whether or not a foreign corporation is to be permitted to acquire and hold property in the State of Louisiana is a question of policy to be determined by the laws of that State, but when it permitted the corporation to come into the State and to acquire property the corporation came in and continued in the exact legal status fixed by the laws of the State of Arkansas. The power to continue corporate existence is but a corollary of the power to create it and it is submitted that Louisiana law may no more continue the corporate existence of an Arkansas corporation than it can create that corporation. To admit the correctness of the underlying principle of this decision is to state that the same corporation, if doing business in every State of the Union, may be totally different in each of the forty-eight States.

In *Canada Southern Railroad Co.* v. *Gebhard,* 109 U. S. 527, 27 Law Ed. 1020, this Court said:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty', Bank *v.* Earle, 13 Pet. 588, though it may do business in all places where its charter allows and the local laws do not forbid. R. R. Co. *v.* Koontz, 104 U. S. 12 (XXVI., 645). But wherever it goes for business it carries its charter, as that is the law of its existence. Relf *v.* Rundel, 103 U. S. 226 (XXVI., 339); and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country. Paul *v.* Virginia, 8 Wall., 168 (75 U. S., XIX, 357), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. * * * It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

The strained construction which the Supreme Court of Louisiana has placed upon Section 30 of Act 267 of 1914 in holding that by reason of this statutory enactment the property remains in the corporation though dissolved results from the desire of that court to achieve what it considers the policy of the Louisiana law to avoid complex estates in property. It, therefore, applies the law of prescription against servitudes of the character involved here wherever there is any apparent justification for so doing. The court, however, has disregarded the principle that neither it nor the laws of Louisiana can continue the cor-

porate existence of this corporation. When the Louisiana Supreme Court and the Circuit Court of Appeals held that the Louisiana statute continued the corporate existence and refused to hold that the Arkansas statute determined that corporate existence, they violated Article IV, Section 1, of the Constitution of the United States.

Under this provision of the Constitution each State for itself must settle the policy of its laws as to the creation, the existence and the dissolution of its domestic corporations. When it has determined these questions it becomes the inescapable duty of every other State under the constitutional provision relied upon to give full faith and credit to the matters so settled.

This constitutional requirement implies that the public acts of a State shall be given the same effect by the courts of every other State that they have by law and usage at home. *Chicago R. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 622, 30 Law Ed. 519; *Christmas* v. *Russell*, 5 Wall. 290, 18 Law Ed. 475.

If the dissolved corporation ceased to exist upon its dissolution and thereafter was incapable of exercising or enjoying the right of ownership, the title to the real right involved herein passed from it, and there is and has been no contention that it passed to any other person under Louisiana law. While the nature of the real right in controversy and the prescription applicable to it are, of course, to be determined in accordance with Louisiana law and the decisions of the Supreme Court of that State, yet that court cannot, in refusing to give effect to the laws of Arkansas in a case where they are controlling, convert that question into a question of Louisiana law and thus override the full faith and credit clause of the Constitution of the United States.

In the case of *Sistare* v. *Sistare*, 218 U. S. 1, 54 Law Ed. 905, this Court considered the effect of this constitutional

provision as it applied to a judgment rendered in the State of New York and sought to be enforced in the State of Connecticut. A valid judgment had been rendered in New York which condemned the defendant to pay alimony but when action was commenced in the courts of Connecticut to recover the amount in arrears, the courts of that State held that the installments of alimony did not constitute debts and were not subject to be collected by execution upon the contention that the statutes of New York provided for a subsequent modification of the judgment by the courts of that State.

This court, however, held that where the authority to modify was not expressly conferred by statute or was not reserved in the decree, such judgment created vested rights and that under the full faith and credit clause of the Constitution, which is obligatory upon the courts of another State in which the judgment is sought to be enforced, it is the clear duty of the courts to recognize it as an enforceable judgment.

In *Converse* v. *Hamilton*, 224 U. S. 243, 56 Law Ed. 749, an action was begun in the State of Wisconsin to enforce double liability of stockholders in an insolvent Minnesota corporation under a provision of the laws of Minnesota. Assessments had been judicially levied in Minnesota upon the stockholders. When the courts of Wisconsin refused to enforce these, the matter was taken to this court upon writ of error and this court, in holding that the laws and proceedings of the State of Minnesota relied upon brought the case within the constitutional provision claimed, said:

> "Thus, the liability to which they relate is contractual not penal. The proceedings were had with adequate jurisdiction to make them binding upon the stockholders in the particulars before named * * *. *And what the law of Wisconsin may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and*

*means of enforcing them, is apart from the question under consideration.*" (Emphasis ours.)

In *Royal Arcanum* v. *Green*, 237 U. S. 531, 59 Law Ed. 1089, your Honors held that the laws of Massachusetts and the charter issued thereunder controlled the rights and obligations of a member of the corporation who became such in the State of New York and that the laws of New York were not applicable in determining his obligations under the charter.

The duty to give full force and effect to the public act of the State of Arkansas is as obligatory as the similar duty in respect to the judicial proceedings of that State. *Smithsonian Institute* v. *St. John*, 214 U. S. 19, 28, 53 Law Ed. 892, 897; *Chicago & Alton Railroad Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 622, 30 Law Ed. 519; *Mills* v. *Duryee*, 7 Cr. 581, 3 Law Ed. 411.

This is not a case of misinterpreting a statute of Arkansas without denying its validity. It is a case where the Louisiana court and the Court of Appeals following that decision refused to apply the Arkansas statute, and since by that statute the Porter-Wadley Lumber Company ceased its existence at the time of its dissolution, the decisions complained of clearly deny full faith and credit to the statute which the Constitution guarantees.

**Second Assignment.**

The decision of the Court of Appeals in holding that the contract whereby the Porter-Wadley Lumber Company reserved the mineral rights in the nature of a leasehold interest for thirty-five years null and void impairs "the obligation of a contract" and violates Article 1, Section 10, of the Constitution of the United States.

The court held that the contract of date February 12, 1916, as part consideration of a sale of lands by the Porter-

'adley Lumber Company to the German-American Invest-ent Company for thirty-five years was null and void.

Article 1764 of the Louisiana Civil Code declares:

> "All things that are not prohibited by law may legally become the subject of contract."

The Supreme Court of Louisiana, in the *Pioneer Gas 'ompany* case, 173 La. 313, said that the distinction be-ween an assignment and a sublease is that in an assign-ient all interest is transferred, and in a sublease an in-erest is retained which imposes some obligation such as ) pay rent or an overriding royalty. The court stated:

> "The reason why an obligation to pay an overriding royalty, or excess royalty, in a transfer of a lease, either in whole or in part, and even though the transaction be called an assignment or a sale of lease, characterizes the transaction as a sublease and not merely an assignment, is that, in oil and gas leases, under the settled jurisprudence of this state, the payment of a royalty is the payment of rent, and is not the payment of a price for oil or gas rights, as if they were sold."

The reservation in controversy herein declares (R. 84):

> "The Porter-Wadley Lumber Company shall pay to vendee hereunder, his heirs, successors, or assigns, one-half of all the net revenue that may be obtained from the sale of the oil, gas, sulphur, and minerals herein reserved."

his, therefore, constituted a valid contract. If there is ny doubt about the proper interpretation of the contract, must be given that interpretation that will save the ontract.[2]

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[2] Louisiana Civil Code, Art. 2013; *Sporl* v. *New York Indemnity Co.*, 176 a. 363.

In *Queensborough* v. *Cazeau*, 136 La. 732, the Supreme Court of Louisiana said:

> "The manner in which one may dispose of one's property is here stated to be almost unlimited."

It appears under the settled jurisprudence of Louisiana giving a proper interpretation to said reservation, it is in the nature of a leasehold estate.

In *Gulf Refining Co.* v. *Glassell*, 186 La. 201, the court said:

> "It therefore appears to us that an oil and gas lease and farm lease are quite alike and should be placed in the same legal category, that is, leases, personal rights, and not real rights."

In *State* v. *Board of Administrators of Tulane*, 125 La. 432, the Supreme Court of Louisiana held that a valid lease contract may be made in Louisiana for a period of ninety-nine years.

This contract was binding between the parties and is the law governing them. At the time this reservation was made, there was no statute or decision of the court holding that the subject matter of said contract was illegal in Louisiana. After said contract was made and the rights thereunder became vested, no subsequent legislation or decision of the highest court could change the terms or conditions of said contract or annul the rights therein vested.[3]

This contract having been based upon the law of Louisiana at the time of its execution and under decisions of the Supreme Court of Louisiana existing at that time, no subsequent change of the position of the Supreme Court can affect the terms and conditions of the contract.[4]

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[3] *Walker* v. *State*, 12 Sup. Ct. Rep. 282; *Whaley* v. *Gailard*, 21 Sup. Ct. Rep. 572; *Gelpske* v. *Dubuque*, 1 Wall. 206, 17 L. Ed. 520; *Union Bank* v. *Oxford*, 90 Fed. 7, 10.

[4] *Muhlker* v. *N. Y. R. Co.*, 197 U. S. 570, 49 L. Ed. 872.

"When absolute rights of property have been acquired and vested by authority of law, no subsequent legislative action can divest this right. So, where a contract is made under the authority of law, the right of property acquired arises not from the law itself, but from the contract to which it pertains as an incident, and the law making power cannot divest the rights thus acquired, originating, not in the law itself, but in acts done under the law and which attach as incidents not to the law but to the contracts made under it."[5]

The contract having been legally made in accordance with the law prevailing at the time of its execution, the United States District Court is without right or authority to annul said contract and to divest appellants of the rights acquired by them pursuant thereto. This is a violation of Article 1, Section 10, of the Constitution of the United States.

Neither can the legislature establish such rules in regard to the management and disposition of the assets of a corporation by which the portion which belongs to stockholders shall be sequestered and diverted from the owners and thus injure vested rights.[6]

**Third Assignment.**

The above facts clearly show that petitioners are the owners of the rights in the mineral reservation. The various sales of the land from the German-American Investment Company by mesne conveyances to C. Orbin Bailey, respondent, specifically acknowledge and recognize petitioners and their authors in title as the owners of said mineral rights. These sales were not made "subject to" said mineral reservation, but definitely reserved said rights.

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[5] *Fletcher* v. *Peck*, 6 Cranch 87, 3 L. Ed. 162.

[6] *Lathrop* v. *Stedman*, 13 Blatch (U. S.) 134; 15 Fed. Cases, No. 8519.

The Supreme Court of Louisiana, in discussing a similar reservation,[7] said:

> "In the course of the opinion rendered in the case it was said that inasmuch as the mineral rights were actually *reserved* from the sale to John Murray and wife, the prescription was interrupted as to a part of the land which they bought."

The Louisiana court held that where mineral rights were reserved in a sale it was an interruption of prescription. In accordance with this authority, the record shows interruptions of prescription February 12th, 1916, the date of the reservation (R. 92-93), by reservation in the sale to G. R. Wise (R. 82), reservation in the sale from Wise to H. L. Munn (R. 80), reservation in the sale from H. L. Munn to C. O. Bailey, respondent (R. 67). The record shows that said mineral rights were preserved by exercise and use. Wells were drilled by petitioners or under their authority December 29th, 1926, and April 9th, 1928, which produced gas in paying quantities until May 19th, 1930 (R. 199-200). The record shows that C. O. Bailey, respondent, executed a joint lease with petitioners February 23rd, 1926 (R. 245-246).

The record shows that the current of prescription was interrupted when C. Orbin Bailey, respondent, accepted rentals and royalties from petitioners under said mineral leases and development as follows: royalty check April 12th, 1929, $27.83; royalties of a gas well April 22nd, 1929, $12.17; $500.00 under lease to Pure Oil Company July 10th, 1930; rental check November 30th, 1935, $240.00; rental check December 9th, 1935, $32.00; rental check November 5th, 1936, $100.00; rental check November 5th, 1937, $20.00; rental check under lease to Arkansas Fuel Oil Company April 28th, 1938, $200.00 (R. 200-201).

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[7] *Lewis* v. *Bodcaw Lumber Company*, 167 La. 1067.

Article 3520 of the Louisiana Civil Code reads:

> "Prescription ceases likewise to run whenever the debtor or possessor makes acknowledgment of the rights of the person whose title they prescribe."

The Supreme Court of Louisiana held:

> [8] "The period of prescription may be interrupted by a written acknowledgment on the part of the obligor, but when so interrupted, it begins anew from the date of the acknowledgment."

Article 3520 of the Louisiana Civil Code was held by the Louisiana Supreme Court to apply to the acknowledgment of mineral rights.[9]

The Louisiana Supreme Court specifically held that a joinder or concurrence in an oil and gas lease extending beyond the prescriptive period is an acknowledgment by the land owner during the term of this lease, and that the prescription of ten years begins to run from the termination of the lease,[10] so, when C. Orbin Bailey, respondent, joined in and concurred in a written lease with petitioners February 23rd, 1926, for a period of three years, it was an acknowledgment of petitioners' rights until February 23rd, 1929, and that prescription of ten years began to run from February 23rd, 1929, and this suit was filed May 12th, 1938, within said ten year period.

It is clear that prescription has not run, first, because of the reservations made in the various transfers, second, by exercise and development of the minerals, third, by the express ratification and concurrence by respondent in a lease with petitioners, fourth, by the acceptance from petitioners of royalties and rentals under leases and develop-

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[8] *Nabors Oil & Gas Co.* v. *Louisiana Oil Ref. Co.*, 151 La. 361.

[9] *Frost Lumber Industries* v. *Union Power Co., Inc.*, 182 La. 439.

[10] *Bremer* v. *North Central Texas Oil Co.*, 185 La. 918.

ment of said mineral rights, and fifth, by the concurrence and joinder in said lease dated February 13th, 1926, for a period of three years, or until February 13th, 1929, the date on which prescription, if it began to run, commenced and would not terminate until February 13th, 1939.

In its opinion, the Court of Appeals said:

> "His express ratification of the lease to Ramsey no more indicates an intention to renew than do his alleged implied ratifications of the three subsequent leases by acceptance of rentals thereunder. Acceptance of rentals under such circumstances does not resurrect mineral servitudes which have become prescribed, either on the theory of tacit renunciation or of estoppel."

The Court of Appeals cited as authority for its opinion *English* v. *Blackman,* 189 La. 255. The Court of Appeals holds that under Louisiana law, a written acknowledgment or acceptance of benefits under written contracts does not operate as a renunciation of prescription or of estoppel when prescription has already run. This statement, in our judgment, is at variance with numerous decisions of the Supreme Court of Louisiana. In *English* v. *Blackman, supra,* cited by the Court of Appeals, the Louisiana Supreme Court quoted from a previous decision[11] as follows:

> " 'But the agreement between H. H. Nolan, then owner of the land, and the heirs of A. L. Smith, and the continual use by Smith and his assigns of the gas produced from other wells on the leased land, was a constant interruption of the prescription; and *indeed Nolan actually stipulated for and accepted the benefits of the lease. This was therefore as full and complete an acknowledgment of the lease as could be wished for; and, being in writing, would have been sufficient to*

[11] *White* v. *Ouachita Natural Gas Company,* 177 La. 1052.

*take the lease out of prescription, even if prescription had already run.'* "

and the Louisiana court further said:

> "Mr. English had accepted benefits under the 1932 lease which indicated that he not only had recognized the interest of his apparent co-lessors, but had apparently intended to interrupt the running of prescription."

In the *English* case, the Louisiana Supreme Court quoted from a previous decision as follows:

> "* * * the fact that English, the land owner, apparently joined the others in making the lease indicated that he not only had recognized their rights, but had consented to an interruption of prescription."

The Supreme Court of Louisiana, in *White* v. *Ouachita Natural Gas Company,* 177 La. 1052, held that one who accepts benefits under a lease fully and completely acknowledges the rights of the parties to that lease, "and, being in writing, would have been sufficient to take the lease out of prescription, *even if prescription had already run*".

The Supreme Court of Louisiana held in *Mulhern* v. *Hayne,* 171 La. 1006, that in a case where the owner of the land joined with the owners of one-half of the mineral rights in a lease for a term of years extending beyond the prescriptive period interrupted prescription. The court said:

> "Here the plaintiff, as the owner of one half of the minerals, joined the persons in whose favor the other half of said mineral rights had been reserved, in the execution of a lease, of all the oil and gas, to a third person, for a term of years extending beyond the prescriptive period, and to an indefinite future period, beyond that time, in the event oil or gas is produced from the leased land. By joining in this lease plaintiff

> thereby recognized all of the rights of his colessors, and he cannot escape the effect of his written, acknowledgment, which, in our opinion, we must hold to be an interruption of the then accruing prescription."

In accordance with these authorities, respondent, in executing the lease beyond the prescriptive period and accepting benefits therefrom, made "as full and complete an acknowledgment of the lease as could be wished for; and, being in writing, would have been sufficient to take the lease out of prescription, even if prescription had already run".

The opinion of the Court of Appeal, referring to petitioners, said:

> "They must prove Bailey's intention to create new rights, not only his recognition that they may have had some rights in the property."

We submit Bailey's intentions can only be proved by his acts. If "A" acknowledges "B" to be the owner of property, the acknowledgment being in writing, by the very case (*English* vs. *Blackman*) cited in the opinion of the Court of Appeals, intends to waive or renounce prescription because his acknowledgment "being in writing, would have been sufficient to take the lease out of prescription, *even if prescription had already run*".

We call the court's attention to the fact that in the *English* vs. *Blackman* case, *English* did not sign a joint lease, as was done by respondent in this case. The Louisiana court said:

> "If, in fact, English, who granted the 1925 servitudes, voluntarily joined the holders of the mineral interests under those servitudes in making the 1932 lease, which by its terms, if kept alive by the payment of the specified rentals, would expire long after the end of the ten-year prescription period applicable to the 1925 servitudes, *that was an acknowledgment of*

*the existence of the rights of his co-lessors and indicates that he intended to interrupt the running of the prescription which he now pleads.''*

Article 3460 of the Louisiana Civil Code reads:

> "One cannot renounce a prescription not yet acquired, but it is lawful to renounce prescription once it is acquired."

Article 3461 of the Louisiana Civil Code reads:

> "Such renunciation of prescription is either express or tacit. A tacit renunciation results from a fact which gives a presumption of the relinquishment of the right acquired by prescription."

The Court of Appeal, in discussing the above articles, said:

> "Apparently, appellants' theory is that such renunciation would operate in the same manner as an interruption of prescription, and would renew their servitude for ten years more, or longer. *The inconsistency of their position is that they claim to have been thus perpetuated in rights of which they had already been irrevocably divested by operation of law.*

Renunciation takes effect after prescription has run, but the above articles of the Civil Code declare that if prescription has been acquired it may be renounced "either expressly or tacitly". How can renunciation of prescription be made tacitly? It can only be done by the acts of respondent in accepting benefits from petitioners from the exercises or use by them of the minerals or from leases covering said rights. The Legislature of a state has the power and authority to declare the basis for renunciation, and the Legislature of Louisiana has definitely declared that renunciation of prescription may be done in two ways, one expressly and the other tacitly. The Court of Appeals declared that petitioners must prove Bailey's intention to

create new rights, "not only his recognition that they may have had some rights in the property". The Supreme Court of Louisiana said (*English* vs. *Blackman*):

> "An acknowledgment of the existence of the rights of his co-lessors indicates that he intended to interrupt the prescription which he now pleads."

If Bailey did not intend to create or acknowledge rights in the appellants, what was the purpose of his executing a joint lease? It could have no other purpose than to acknowledge the appellants' rights and to renounce any prescription that may have occurred. What would Bailey mean when he declared in writing that he "does hereby *ratify, affirm, and approve the execution* (of the lease) *by said lessors to W. R. Ramsey*" insofar as it affected the rights acquired by him in accordance with the reservation of the Porter-Wadley Lumber Company and the German-American Investment Company? If it was not a renunciation, what was it? What was the purpose of it? Why did he execute the lease for a consideration? Why did he acknowledge in writing that the lessors, appellants, had full authority and power to make a lease, which power and right he expressly ratified and approved?

These acts of respondent clearly show his intention to acknowledge the rights of petitioners and to interrupt the current of prescription. If it be held that prescription had run, the acts of the respondent show definitely a renunciation both expressly and tacitly.

The opinion in this case is tantamount to holding that the prescriptive rights in Louisiana are the same as peremptory rights; that prescription once occurring, the parties cannot renounce it. In other words, the effect of the opinion is that after the expiration of ten years, Bailey could not, by act or deed, tacit or express, waive prescription, renounce prescription, or recognize the rights of appellants. We sub-

mit that under the laws of Louisiana, Bailey could do this. He is not creating new rights. The rights already existed. He is simply renouncing his personal right or privilege to urge prescription in bar of the rights of appellants.

Bailey further declared his intention by accepting rentals from lessors covering the same rights under three subsequent leases. Having done this, could Bailey attack these leases? If he could not attack these leases, could he attack the title covered by the leases? If the law provides for a declaration against interest, if it establishes the principle of estoppel, if it provides that one may ratify a defective title or waive a person right (right to urge prescription), do not the written declarations and the continuous conduct of the plaintiff bar him from any attack upon the rights or title of appellants? The opinion holds that appellants "must prove Bailey's intention to create new rights". The fact that ten years has expired does not *ipso facto* divest appellants of their title. It requires an affirmative action on the part of Bailey to have these rights voided on the ground of prescription. Prescription is not self-operative. At the expiration of ten years, Bailey did not urge prescription. He expressly renounced it in writing as effectively as the English language can make it.

The plaintiff, having full possession of his faculties and not laboring under any legal disabilities, could he not "create rights" in others or waive his personal rights? His actions and his conduct and his written declarations do exactly this, if indeed, new rights were created, which we deny.

The statement in the opinion that the rights of appellants "had already been *irrevocably divested by operation of law*" is not in accordance with the law of Louisiana. Rights that are subject to prescription are not "irrevocably" divested because the party in whose favor prescription may have run may not plead prescription, may waive prescrip-

tion, and therefore, before the rights of one party have become lost and acquired by the other, they must be affirmatively urged and established.

The statement that such rights by prescription are "*irrevocably divested*" has no support in Louisiana law. The word "*irrevocably*" means that it cannot be recalled or revoked or annulled. Would it be contended that the plaintiff in this case could not revoke or waive prescription? Can it be contended in the face of the Louisiana Civil Code that he could not do this expressly or tacitly? Prescription, even though it had been acquired, may be so renounced.[12] One who relies on prescription must plead it. The court cannot supply it, and the proof must be clear.[13]

It is clear that prescription does not "*irrevocably*" divest title, but it may be waived, interrupted, or not urged. We submit that the opinion is erroneous.

**Reservation is a Lease and Not a Sale**

In *Rives* v. *Gulf Refining Company,* 133 La. 182, the court said:

> "It is immaterial by what name it is called, whether a lease, license, sale, contract, grant, deed of conveyance, a real right, an incorporeal right, a hereditament, a chattel interest, a chattel real, a right in land, or other name. *The court will look to the language used in the instrument aside from these terms so used, and determine its legal effect.*"

A lease is defined in Article 2674 of the Louisiana Civil Code as follows:

> "To let out a thing is a contract by which one of the parties binds himself to grant to the other the enjoy-

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[12] C. C. 3460, 3461; *Coon* v. *Brashear,* 7 La. 265; *Marioneaux* v. *Brugier,* 1 McGoin 257.

[13] C. C. 3426; *Ashbey* v. *Ashbey,* 41 Ann. 100; *White* v. *White,* 50 Ann. 104.

ment of a thing during a certain time, for a certain stipulated price which the other binds himself to pay him."

Article 2671 of the Louisiana Civil Code reads:

> "The price should be certain and determinate, and should consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased."

In *New Orleans* v. *Shakespeare,* 39 La. Ann. 1033, the court said:

> "A lease for fifty years, entire rental paid in advance and stipulation that improvements revert to city at termination of lease, held valid."

In *Palmer* v. *Bender,* 49 F. (2d) (2nd series) 316, the court said:

> "A mineral contract, whether in form of sale, assignment, or lease, conveys only right to property."

The reservation in this case is for a period of thirty-five years, and therefore is "the enjoyment of a thing during a certain time". The reservation provides that respondent shall receive one-half of the net amount derived from the sale or other disposition of the minerals or mineral rights, and is therefore "a portion of the fruits yielded by the thing leased". This reservation is not different from a paid-up lease for thirty-five years, and the rights and privileges of petitioners as the sole stockholders of the dissolved Porter-Wadley Lumber Company and C. Orbin Bailey, respondent, are similar to those of the lessor and lessee. The obligation to pay one-half of the net amount received from the development or sale of minerals is equivalent to a rental or royalty interest which runs with the land.

Fred A. Koch, representative of the German-American Investment Company, testified (R. 132) that it was in the nature of a lease.

The Supreme Court of Louisiana, in *Smith* v. *Sun Oil Company,* 165 La. 911, in interpreting an assignment of a mineral lease, held:

> "The fact that the Sun Company, as sub-lessor, and Elliott, sub-lessee, in their contract used the words 'grant, convey, transfer and assign' did not of itself make the contract an assignment merely or deprive it of the character of a sublease. * * * The conditions of and in the contract between the Sun Company and Elliott which made it a sublease and not merely an assignment, were that the Sun Company did not dispose of all of its rights and obligations under the original lease on the twenty acres of land, but granted to Elliott an interest less than its own and imposed upon him obligations under penalty of reversion to the Sun Company in addition to the obligations which Elliott assumed in favor of the original lessor."

In *Robinson* v. *Pioneer Gas Company,* 173 La. 320, the court said:

> "The distinction between an assignment of a lease and a sublease is that in an assignment the assignor transfers his entire interest in the lease insofar as it affects the property on which the lease is assigned, whereas, in a sublease, the original lessee, or sub-lessor, retains an interest in the lease insofar as it affects the property subleased by imposing some obligation upon the sub-lessee in favor of the sub-lessor, such as an obligation to pay an additional rent to the sub-lessor."

It may be argued that appellants did not buy these mineral rights from appellee but the reservation was made in favor of appellants by and with the consent of the appellee. A reservation has all of the qualities of a purchase and when appellee consented to the reservation it is identical with a grant by appellee to appellants of the mineral rights. As part of the consideration of the sale, appellee became the owner of the surface of the land unconditionally and

granted a qualified reservation to appellants of the mineral rights, and this reservation continues for thirty-five years only so long as one-half of the net proceeds was paid to appellee.

In the deed between the Porter-Wadley Lumber Company and the German-American Investment Company, the surface of the land was conveyed by the Porter-Wadley Lumber Company to the German-American Investment Company and the mineral rights were conveyed by the German-American Investment Company to the Porter-Wadley Lumber Company, because, by that very instrument, the title to the land became vested in the German-American Investment Company and the mineral rights in the Porter-Wadley Lumber Company, subject to certain conditions and obligations, to-wit: the payment of one-half of the net proceeds derived from the development or sale of the minerals or mineral rights for thirty-five years.

Can it be contended that the Porter-Wadley Lumber Company could have developed the property, sold or transferred the mineral rights, leased or subleased them, or made any other contract respecting said minerals or mineral rights for consideration and not pay one-half the net proceeds to the land owner? And will it be contended that if these payments were not made, that the land owner would not have a cause of action to set aside, cancel and annul and revoke said mineral reservation? The mineral reservation has existence and can continue only so long as these payments are made.

A reservation of the minerals could not be attacked by the land owner at any time within ten years subsequent to the date of said reservation, but the reservation as contained in this deed could be attacked and set aside by the land owner whenever the Porter-Wadley Lumber Company failed to comply with the conditions of the reservation and pay one-half of the net proceeds derived from the sale or de-

velopment of its minerals. The difference, therefore, is patent between the reservation contained in this deed and the reservation of mineral rights only. It can be interpreted in no other light than that it is in the same category as a leasehold estate, paid up for thirty-five years, subject to the condition that the holder of the mineral reservation pays one-half net proceeds derived from the development or sale of the minerals or mineral rights to the land owner.

The Supreme Court of this State upheld a stipulation in a deed and said:

> "The manner in which one may dispose of one's property is here stated to be almost unlimited."

Article 1764 of the Louisiana Civil Code declares:

> "All things that are not prohibited by law may legally become the subject of contract."

Article 2013 of the Louisiana Civil Code states that:

> "The real obligation created by condition annexed to the alienation of real property, is susceptible to all of the modifications that the will of the parties can suggest, except such as are forbidden by law."

The above reservation is not contrary to public policy, good morals, nor does it contravene a prohibitory law.

In *Sporl* v. *New York Indemnity Company,* 176 La. 363, the court said:

> "A contract capable of two interpretations, one saving and the other condemning it, must be given the interpretation saving and contract."

What is illegal about this contract? In *Gulf Refining Company* vs. *Glassell,* 186 La. 201, the court, in discussing an oil and gas lease, stated:

> "Oil and gas leases and farm leases are quite alike and should be placed in the same legal category, that is

leases * * * personal rights and not real rights, * * *."

This is the latest expression of the Supreme Court of Louisiana, and it has been cited by the United States Court of Appeals, Fifth Circuit, with approval.[14] It declares that oil and gas leases are personal contracts and are not servitudes. It is true that since this decision was rendered the legislature passed an act declaring oil and gas leases real rights, but this act was passed subsequent to the transaction involved in this case, and of course has no retroactive effect. Considering then that the oil and gas lease was, then, under the authority of *State* vs. *Board of Administrators of Tulane,* 125 La. 432, a valid lease contract may be made in this state for a period of ninety-nine years.

It is the policy of the courts[15] to give a contract which is the law between the parties, that interpretation which will make the contract enforcible and to carry out the intention of the parties, which in this case was testified to by Mr. Wadley, as representing the seller, and Mr. Koch, as representing the buyer, when the reservation in the deed was made.

While this contract may be in some respects unusual, it is nevertheless the law between the parties and should be enforced so long as it does not contravene good morals or public policy.[16]

It is clear, therefore, that the contract constitutes a reservation of a leasehold interest of a mineral right, less than the whole, equivalent to or in the same category as a lease-

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[14] *Pan-American Production Co.* v. *United Lands Co.,* 96 F. (2d) 28; *Sabine Lbr. Co.* v. *Broderick,* 88 F. (2d) 588.

[15] *Fallo, Inc.,* v. *Durr,* 4 La. App. 155; *Brown* v. *Gardner,* 157 So. 137; C. C. Arts. 1945 and 1950; *Boisseau* v. *Vallon,* 174 La. 492; *Ascension Red River Cypress Co.* v. *Red River Drainage District,* 149 La. 764; Succession of Greenlaw, 149 La. 255.

[16] *American Cotton Cooperative Corp.* v. *N. O. Railway Co.,* 180 La. 836.

hold interest, and is not subject to the prescription of ten years *liberandi causa.*

**Fourth Assignment.**

This assignment of error is directed at the opinion of this court in holding that the rights were vested in the Porter-Wadley Lumber Company and has decreed them null and void, when the Porter-Wadley Lumber Company has not been made a party to this litigation. It requires no citation of authority to support this statement. Any judgment rendered against the Porter-Wadley Lumber Company when it is not made a party is absolutely null and void as to the rights of the Porter-Wadley Lumber Company. The opinion, therefore, is inconsistent with the decree against the stockholders of the said corporation holding that the mineral rights against the corporation were null and void. If, as the court held, the Porter-Wadley Lumber Company, an Arkansas corporation, was not dissolved, and we ignore the dissolution proceedings under the laws of the state of its creation, then, we submit that the mineral rights are vested in the Porter-Wadley Lumber Company, and that the stockholders, appellants herein, have no interest in the mineral rights and no decree could be rendered against them annulling the corporate rights. The plaintiff has acknowledged the dissolution of the Porter-Wadley Lumber Company in instituting this suit against the stockholders. The plaintiff has brought a suit against the stockholders to have these mineral rights declared null and void. He has not made the Porter-Wadley Lumber Company a party to this suit. No citation was made upon the Porter-Wadley Lumber Company as a corporation. The laws of Louisiana provide a method of suing a foreign corporation by asking a judgment against the foreign corporation and asking that citation be made upon the Secretary of State. None of these things were done.

The plaintiff is contending in this Court that the lumber ompany is still a corporation and still owns the mineral ights; yet, he has not made the company a party to the uit. He has made the individual stockholders parties and s seeking a judgment against them to cancel the mineral ights, which he says the stockholders do not own, and to ancel a mineral reservation in the nature of a leasehold ight owned by the corporation. This assignment of error s well taken, and the opinion and decree should be annulled.

**Conclusion.**

It is therefore respectfully submitted that this case is one alling for the exercise by this Court of its supervisory owers in order that this case might be reviewed, and hat to such an end a writ of certiorari should be granted nd this Court should review the decision of the Circuit ourt of Appeal and finally reverse it.

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